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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1353

THE ELMO COMPANY, INC., *Petitioner,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray issuance by this Court of a writ of certiorari directed to the United States Court of Appeals for the District of Columbia Circuit, to review that Court's interpretation of the last sentence of Section 5(b) of the Federal Trade Commission Act:

> "Where the statute expressly permits reopening of an [consent] order as the public interest requires, we see no reason to employ a higher standard of public interest than in that part of the same section of the statute relating to the issuance of an initial complaint. The function of the Commission is essentially the same in both instances." (App. p. 5a)

Your petitioner says, to the contrary, that Congress favored administrative finality and consequently required the showing of a specific public interest justifying any reopening of an existing decree, in addition to the merely *prima facie* showing sufficient for the *ex parte* issuance of an original complaint.

Opinions Below

The Court of Appeals opinion is not as yet officially reported. It is printed in the Appendix at page 2a and in CCH 1967 Tr. Cas. ¶72,320.

The Federal Trade Commission order which was affirmed by the Court of Appeals is not reported. The opinion is printed in the Appendix at page 11a. See CCH—1965-67 Trade Reg. Rep. ¶ 17,329.

The prior opinion of the Court of Appeals directing the proceeding which resulted in the issuance of the order appealed from is reported at 348 F. 2d 342 (1965), (App. p. 36a).

Jurisdiction

The final decree of the Court of Appeals was filed January 23, 1968. There has been no application for rehearing or for enlargement of time for the filing of this petition.

The certiorari jurisdiction of this Court arises generally under 28 U.S.C. § 1254 (1), and specifically [*sub nom.* "section 347 of Title 28"] as to reopening orders by the last sentences of paragraphs (b) and (c) of § 5 of the Federal Trade Commission Act (15 U.S.C. § 45).

Question Presented

Petitioner concurs fully with the issue as formulated by the Court of Appeals:

"The only substantial question raised by this appeal

is what showing of public interest is necessary to reopen a final order of the Federal Trade Commission." (App. p. 4a)

Statutes Involved

Federal Trade Commission Act, Sept. 26, 1914 c. 311 §§ 1-18, as am. 38 Stat. 717, (15 U.S.C. §§ 41-58).

§ *5 (b)* [*15 U.S.C. § 45 (b);* complete text at App. p. 56a]. *Proceeding by Commission; modifying and setting aside order*

. . . . .

(b) Whenever the Commission shall have reason to believe that any . . . person, . . . is using any unfair method of competition, . . . and if it shall appear to the Commission that a proceeding by it in respect thereof would be in the interest of the public, it shall issue . . . a complaint. . . . If upon . . . hearing the Commission shall be of the opinion that the method of competition . . . is prohibited . . . it shall . . . issue . . . an order requiring such person, . . . to cease and desist. . . . Until the expiration of the time allowed for filing a petition for review . . . the Commission may at any time, upon such notice or in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days

after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

§ 5(g) [15 U.S.C. § 45(g)] Finality of order

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); . . .

Federal Trade Commission, Rules of Practice, Rule V, Para. (f), effective Aug. 4, 1951.

V

Complaints, defaults, consent settlements.

. . . . .

(f) Pursuant to a change of law or facts, or when the public interest so requires, a consent settlement may be altered, modified, or set aside in whole or in part upon consent of all parties. All consent settlements shall contain an agreement that if consent to a change desired is not obtained, the Commission or any respondent may file a motion in the case to set aside such consent settlement in whole or in part on the grounds that the public interest so requires; and after opportunity for hearing upon the issues formed, the Commission may, if it finds that a change of law or fact, or the public interest so requires, set aside the consent settlement or any part thereof which is separable from the remaining provisions without changing their effect. Thereafter, the Com-

mission may, by adversary proceedings pursuant to the original complaint, or a new or amended and supplemental complaint, undertake corrective action as to any acts or practices not prohibited by any remaining provisions of the consent settlement.

Statement of Case

1. *First Proceeding, 1952.**

The Elmo Company was organized by two otolaryngologists (ear, nose and throat doctors) in the 1930's to sell their remedy for the ear noises which affect older people. The early Elmo advertising claimed to cure this condition. The Commission, in 1952, issued a complaint against such advertising. Elmo then negotiated a cease and desist order, which was formally approved by the respondent Commission as being in the public interest, (15 FTC 1379).

The decree, as approved, limited Elmo to a single claim in future advertising;

> "... temporarily relieving the catarrhal condition and the resulting deafness or impaired hearing and ear or head noises." (15 FTC 1379 at 1391)

And, Elmo advertising since 1952 has so limited itself.

> "Compliance with the 1952 order is not an issue in this proceeding." (Resp. Ct. of App. Bf. p. 12)

The 1952 decree provided that it could only be amended in accordance with Rule V(f) of the then-effective Rules of the Commission. Under this former Rule or under the last

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* To avoid unnecessary recourse to pages in the original agency file, petitioner's record references were compiled in support of its proposed findings before the Commission (JA 134-142) and are here reprinted in the Appendix (pp. 48a-55a). "JA" references are to the Joint Appendix filed in the Court of Appeals.

sentence of Sec. 5(b) of the Federal Trade Commission Act, modification could only be made only after notice and hearing on one of the three statutory grounds, a change of fact, a change of law, or that the public interest so required.

Nine years after the entry of this consent decree, your present petitioner purchased the Elmo business from its founders, after receiving legal opinions that Elmo was in compliance with the 1952 order (JA 114).

2. *Second Proceeding, 1962.*

In 1962, the respondent Commission advised petitioner that it had tentatively determined that the Elmo treatment had no therapeutic value of any kind, and that unless petitioner accepted a new decree eliminating the one exception of the 1952 order, a second complaint compelling such a change would be issued against it. Petitioner pleaded the reopening provisions in the 1952 decree, Rule V(f), and the last sentence of Sec. 5(b) of the Act, without result. Petitioner then sought injunctive aid from the District Court which denied jurisdiction.

While the appeal from this ruling was pending, the Commission issued the second complaint against Elmo. This copied the 1952 complaint except to assert in addition the commission's new conclusion about Elmo. Against petitioner's request to abide the Court of Appeals ruling, the respondent Commission instituted hearings under this complaint. The proceeding was then aborted when the Court of Appeals (App. p. 45a) reversing the District Court, held that respondent Commission had to adhere to its 1952 decree, including the procedural provisions for reopening. The Court there explained the policy implied in the last sentence of Sec. 5(b) of the Act:

> "Congress at least considers the finality of consent orders to be of more than trivial concern. . ."

And, accordingly, it was for the Commission to show

> "... some public interest consideration—which justifies setting aside the consent order." *Elmo Division of Drive-X* v. *Dixon*, 121 U.S. App. D.C. 113; 348 F. 2d 342, (1965)* (App. p. 42a ftn 7)

Petitioner's position before this Court is that the quoted language of the Court of Appeals on this first ruling is the correct interpretation of the Act, in that it spells out the requirement that the respondent Commission show a public interest consideration which would demonstrate

> "... the necessity for disturbing such order." (App. p. 42a)

Respondent Commission, disagreeing with the burden of proof thus set, sought a rehearing *en banc* which was denied. In its present opinion, (App. p. 12a) respondent asserts that it only failed to seek a writ of certiorari from this Court at that time because it regarded the Elmo opinion as *sui generis*.**

3. *Third Proceeding, 1966.*

On remand, respondent Commission withdrew the second complaint, voided the trial proceedings, and issued an order requiring petitioner to show cause why the second complaint should not be reinstated and a new cease and desist order issued thereunder. Following petitioner's objection and further discussions of the opinion of the Court of Appeals, respondent Commission withdrew the show cause

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* This decision was the subject of a note in 41 NYU L.R. 198, March, 1966.

** Actually, the Commission had lost in 1945 on substantially the same question of procedural right before the Eighth Circuit in the only other case we find challenging their avoidance of reopening proceedings. *American Drug Corp.* v. *FTC*, 149 F.2d. 608.

order and directed the holding of a reopening hearing (JA 4). In the order respondent repeated the prior *ex parte* allegations of the withdrawn complaint that:

> "... the aforementioned drugs and devices will not cure or have any beneficial effect . . . and, accordingly, the respondent's advertisements are misleading in material respects and constitute 'false advertisement'. . ."

The third proceeding was described by the Court of Appeals:

> "A hearing examiner held hearings at which the Commission and petitioner were represented by counsel who presented briefs, proposed findings and oral arguments. Each side also presented the written statements, in question and answer form, of three experts relating to the effectiveness of the "Elmo Palliative Home Treatment". The experts for the Commission, although none of them had tested the Elmo treatment, stated that its stipulated ingredients could have no beneficial effects on the loss of hearing or head noises. The experts for petitioner stated that, although the ingredients of the Elmo treatment have been supplanted by modern drugs as the most effective treatment, they do have some beneficial effects on head noises and loss of hearing, and some doctors still recommend these ingredients. Petitioner also presented fourteen texts on otolaryngology and pharmacology to support the claimed beneficial effects of the ingredients of its products." (App. p 3a)

The Court of Appeals further pointed out that there was no showing on this hearing by respondent Commission of any change of fact or law between 1952 and 1966, and the Commission relied exclusively on the "public interest basis". (Op. Ftn. 3, p. 3, App. p. 4a)

At that hearing, counsel for the respondent Commission argued that the examiner should restrict consideration to the evidence submitted by the Commission:

"HEARING EXAMINER SCHRUP: And your position then is that all you have to show now is that there are false representations existing which the old consent order did not reach, and therefore, the consent agreement should be abrogated and a trial should be had to determine whether the representations being made today are false and should be prohibited.

"MR. CHARLTON: That is correct.

"MR. LEONARD: . . . Essentially, the position Mr. Charlton is now taking is, and this I deny as a matter of law, that any evidence which in effect would base a complaint today, an original complaint today, is sufficient evidence to open an existing decree.

"MR. CHARLTON: I feel that I don't have to make out an entire case here in this proceeding for the limited purpose of setting aside the old order, that I merely have to show enough evidence to the Hearing Examiner to indicate that the old order is not sufficient or strong enough or adequate enough to protect the public interest, and I don't think we need a full-blown hearing on that because if I make a showing it is not sufficient to protect the public interest, then the respondent gets an opportunity to present his case entirely in a new complaint proceeding.

"HEARING EXAMINER SCHRUP: Your position, then, as I gather it now, is that in this posture of the proceeding this is not the time to have a full-dress rehearsal of all the facts and testimony.

"MR. CHARLTON: That is correct, right.

"HEARING EXAMINER SCHRUP: And an initial decision.

"MR. CHARLTON: That is correct.

"HEARING EXAMINER SCHRUP: Merely now we are in a position as I take it as to whether there are reasons for the rescinding—reopening and rescinding of the consent agreement and then would I have to make a recommendation in your opinion that there is a basis for a complaint or merely there is a basis just for reopening the consent agreement.

"MR. CHARLTON: That is correct, basis for setting aside the consent order in whole or in part.

"HEARING EXAMINER SCHRUP: And then as to whether a new order to cease and desist should issue, that would depend on a hearing in which medical testimony would be presented and other factual evidence.

"MR. CHARLTON: Right.

"HEARING EXAMINER SCHRUP: I take it you disagree with that position, Mr. Leonard.

"MR. LEONARD: Both with the law and with the fact.

"HEARING EXAMINER SCHRUP: I do not understand that this would be an adversary hearing at this point. I think this will decide whether or not an adversary hearing should be held. (JA 17-18)

We now consider whether the examiner did limit his consideration as so indicated. To show this, we first summarize the hearing.

The Court of Appeals noted that the opinions of twenty experts were placed before the examiner by written submissions either of their proposed testimony or their professional texts, three by Commission counsel, seventeen by petioner.*

Petitioner produced every major text used in the field of

* Needless to say, petitioner would not think of arguing to this Court that mere numerical superiority of experts establishes any proposition. However the merits were not in issue. The question was what each of the parties could later produce if a hearing on the merits were required.

otolaryngology and pharmacology, several of which had been so described by Commission witnesses.

Nineteen of the twenty authorities, including two of the Commission doctors, verified the use of various pharmaceuticals and devices used in the Elmo treatment as being standard for the relief of catarrhal symptoms including tinnitus (ear noises). Of the six proposed witnesses, five had prescribed similar formulations for their patients in their earlier practice; and four stated that these drugs were still used by physicians to a limited degree in medical practice today. Taking *only* the three Commission-proposed witnesses:

"Dr. Procter (JA 44, 108)

Q. Is there anything new or unsual about these preparations or devices?
A. No.
Q. Have you used or tested the various preparations or devices included in this treatment?
A. No.

"Dr. Fox (JA 110, cf. JA 63)

Q. Dr. Fox, I understand that you have made no test of any kind on the Elmo products?
A. No, sir.
Q. My question was, what others have you tested?
A. The ingredients I have used many times. I have not tested a product containing them in any such a combination.
Q. You have used these ingredients?
A. Yes, I have used these ingredients.

"Dr. Myers (JA 73)

Q. Is there anything new or unsual about any of these preparations or devices?

A. No, sir.

Q. Have you used or tested the various preparations included in this treatment?

A. I have used a formula like this. In the older practice . . . it was common procedure. . . . before the days of antibiotics. . . ."

No witness appeared in person and, so far as petitioner knows, the examiner had no basis for selecting one over another. Of the six whose statements were submitted in question and answer form, three from each side, the *curricula vitarum* leave little choice, except to note that among petitioner's three was possibly the most respected pharmacologist in the United States, Dr. McKeen Cattell, Dean of Pharmacology at Cornell, President of the American Society of Pharmacology, of the New York Society for Medical Research, and of the American College of Clinical Pharmacology.

But the examiner made no effort to compare the submission of the two parties. Instead he made all affirmative findings exclusively from material selected from the Commission's submission. His critical "Finding 10" in nine pages (App. pp. 23a-30a) actually copies word for word (including questions as well as answers) the entire testimonial submission made by Commission counsel—excising only the admissions of the same three proposed witnesses about their prior acquaintance with these drugs in their medical practice, their own prescription of similar formulae and their testimony as to the medically accepted therapeutic properties of the ingredients. All witnesses and textual authorities submitted by the petitioner were collectively dismissed in a formula phrase ("Finding 11" App. p. 31a) that they had been given full consideration.

Having so separated the exhibits according to the side proffering them, the examiner drew his essential conclu-

sion as stated in finding 11 (App. p. 31a) and repeated thereafter (App. p. 33a) as follows:

> "11. The professional qualifications and specialized medical experience of the witnesses* and the excerpts from *their medical testimony set forth in foregoing finding number 10* . . . show . . . sufficient reason to believe that the public interest requires and would best be served, by the setting aside in part of the consent settlement's findings . . ."
>
> (Underlining added)

> "the testimony of the medical witnesses *as submitted by Commission counsel and set forth in preceding finding number 10* . . . is in agreement and unequivocal that . . . the treatment will not . . . (Emphasis added) (App. p. 33a)

On review, counsel for the respondent Commission made the same assertion of limitation of consideration to Commission evidence:

> "COMMISSIONER JONES: Now, as I understand Mr. Leonard, he says, 'Well, you haven't shown enough because although you have made the assertion that you are going to try and prove that this is worthless, in fact I have put enough in to balance out your evidence and, therefore, there isn't sufficient validity or potential validity to your proposition to warrant this proceeding being opened.' Now, what do you have to say to that?

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* This means in the examiner's lexicon, the Commission submission. As a reading of the report shows 'professional qualifications', 'qualified and experienced specialists', 'doctor', 'specialized medical experience', 'qualified and experienced medical specialists', who are 'in agreement', whose testimony is 'unequivocal' always refers to the written submission of the Commission. The 17 others are denigrated by relative understatement as 'experts'.

"MR. CHARLTON: This is based on Mr. Leonard's argument that the Commission's burden of proof is to show a preponderance of the credible evidence to justify a setting aside. I think that is a false argument. I find no basis for it in any of the cases that he has cited, and in the judicial history of the act and the last sentence in the section concerning it he tries to make a distinction between the words 'interest of the public' and 'public interest.' (JA 175-6)

"CHAIRMAN DIXON: If we have any problem, we must be at odds as to what type of evidence should have been put in the record to satisfy this.

"MR. CHARLTON: That is right. I think we have only determination to make, just what is the amount of public interest that has to be shown by the Commission in order to set this aside.

Mr. Leonard argues a preponderance of the credible evidence. If you buy that, then we have no alternative. I have not made that showing, I don't think, on the record. I say I just have to make a showing of reasonable grounds to set aside this order in the public interest. I believe that I have fulfilled that showing. (JA 178)

The respondent Commission affirmed the examiner, specifically basing its decision on the Commission evidence in "finding 10" (Op. Par. 2, App. p. 13a)

"2. The medical testimony . . . *summarized in Finding 10* . . . supports the conclusion that . . . Elmo . . . [has] . . . no beneficial effect whatsoever . . ."

"4. *On the basis of the foregoing,* we conclude that the 1952 order fails adequately to protect the public interest." (App. p. 13a) (Underlining added)

As Finding 10 is wholly limited to the proposed Commission evidence and the only grounds on which an administrative ruling can be upheld are those which the agency has given as a basis for the exercise of its powers; *S.E.C. v. Cheney*, 318 U.S. 80, 63 S.Ct. 454; *Miss. River Fuel Corp. v. F.P.C.*, 82 App. D.C. 208, 163 F.2d. 433; *Hammond v. Hull*, 76 App. D.C. 301, 131 F.2d 23, cert. den. 318 U.S. 777, the parties stipulated that the legal sufficiency of paragraph 4 was the only issue on appeal. (App. p. 7a)

Thus we presented the legal question without complication of any factual issue on the underlying merits, petitioner having stipulated in effect that *Commission testimony* when taken alone indicated Elmo had "no beneficial effect." In other words, we conceded for appeal that the Commission had shown *information adequate to support the issuance of an initial complaint.*

The Court of Appeals affirmed the Commission, holding (a) that a public interest showing adequate for the issuance of a complaint under the first sentence of § 5(b) was sufficient to reopen an order under the last sentence of that section, and (b) such a showing had been made.*

Petitioner disagrees and seeks review by this Court of this holding that the two are equivalent.

Reasons Relied on for Allowance of Writ

This case challenges for the first time before this Court the powers claimed by the respondent Commission to amend

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* The Court also referred, without specific conclusion, footnotes 2 and 5 to the examiner's language that Elmo—as permitted under the 1952 decree—was advertising and selling its product. Any implication that public injury results from this is, of course, begging the question since the argument is circular, adopting the presumed conclusion of lack of value as the premise of the new conclusion of injury. But if the presumed conclusion of the FTC about the Elmo product, as we argue in this brief, is based on an inadequate showing, then clearly jurisdiction cannot be evoked by assuming it to be so.

existing cease and desist orders by procedures which place the burden of proof on the person subject to the order. This administrative accretion of authority has a long history.

In the original 1914 Federal Trade Commission Act, a cease and desist order once final under Sec. 5(g), could be modified only by application to the Courts. Then, came the 1938 modification of the statute by the Wheeler-Lea Amendment for the purpose of eliminating the necessity of showing an injury to competition. This change was effected by the enactment of a bill known as S. 1077. In its original form in the Second Session of the 75th Congress, S. 1077 contained no provision for modification of decrees. In the Third Session of that Congress, however, following the testimony of Judge Davis, Chairman of the Commission, an amendment was inserted in the Senate bill which permitted the modification of a cease and desist order in any case where the Commission could obtain *the consent of all persons subject to the order.** The bill remained this way until the final conference committee revision, which adopted the present language and was introduced to the floor of the House by the Committee Chairman, Burton K. Wheeler, without explanatory discussion. (Cong. Rec., 75th Congress, 3rd Session, p. 3255, March 11, 1938) Nor did the conference report explain the change. (House Report No. 1774, Feb. 8, 1938, 75th Congress, 3rd Session)

The hearing requirement of last sentence of Sec. 5(b) of the Act as thus added in 1938 was copied into the Commission Rules as Rule V(f) the procedures given being identi-

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* As nearly as can be determined from the hearings before the committees on S. 1077, the complaint of Judge Davis with respect to modification was based on incidents where persons subject to such an order either sold their business to others, changed the form of their advertising, or the nature of their product, or in other ways sought a technical avoidance of the restraints of the original order. This of course is not the case in the present proceeding, where Elmo concedes that it is the successor of the respondent in the original decree and is bound by it.

cal with the Act, but V(f) has since been dropped in favor of a Rule 3.28 by which the respondent Commission simply issues a show cause order against the person subject to the original order to come forward and show why it should not be modified to the form that the Commission desires. Thus the procedure under this new Rule eliminates the separate reopening hearing provided by Congress by merging it into a second hearing on the merits.* (Detailed in 2d. par. of Comm. Op. App. p. 11a). This also disposes of the problem of requiring the Commission to sustain on an adversary hearing the burden of showing some particular consideration to reopen the existing decree, since the order to show cause, like an original complaint is necessarily based on an *ex parte* Commission view of its own staff-prepared evidence.

We believe the Court of Appeals in its first determination (*supra*, p. 36a) was more cognizant of this question of the burden of proof than in the ruling from which this application is brought. In the second instance it was clear that respondent Commission had gone through an appropriate form of proceeding. The rather obvious lack of any "contested' or 'adversary' character to the proceeding was not a drawback to the Court of Appeals since, as it ruled, no greater evidentiary burden was laid on the respondent Commission in reopening under the last sentence of 5(b) than was required for the unilateral Commission determination to issue a complaint under the first sentence.

Petitioner says that this question (a) has not previously been ruled on by this Court, (b) is of importance as a general principle of administrative law, as well as, (c) in its applicability under the Federal Trade Commission Act to all existing final decrees and the modification powers of the

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* The description in the Commission's opinion suggests that a hearing occurs only if the Commission first agrees that a 'substantial' question of fact exists.

respondent Commission respecting them, and (d) in petitioner's view, the principle of equivalence announced by the Court of Appeals is contrary to the decision of this Court in the *Seatrain, Delta* and *American Trucking* decisions discussed in the Argument.

Summary of Argument

I

As a statutory prerequisite to reopening a final cease and desist order under § 5(b) of the Federal Trade Commission Act, the respondent Commission must first bear the burden of showing on a contested and adversary basis that there exists a particular specific consideration of public interest which justifies such a reopening, a consideration of greater weight that the established public interest in concluding administrative proceedings and encouraging consent decrees. The Court of Appeals was in error in holding that the evidentiary burden of the respondent Commission was no greater in such case than that required for the *ex parte* issuance of an initial complaint.

II

The Only Specific Public Interest Factor Asserted by Respondent is an Inadequate Basis for Reopening.

III

The Failure of the Commission to Make a Proper Showing Deprives Petitioner of Substantial Rights.

ARGUMENT

I

To reopen a final decree under the Federal Trade Commission Act, in the absence of any change of fact or law, the Commission has the burden of showing a particular consideration of public interest greater than the existing public interest in concluding administrative proceedings and encouraging consent decrees.

The Court of Appeals ruled against petitioner on the ground that "The function of the Commission is essentially the same. . ." in "the issuance of an initial complaint" and the "reopening of an order". But the former is a unilateral action of the Commission based on its assessment of whatever information its staff presents. There is no hearing, no means in fact, of going beyond the preliminary *prima facie* aspect of a case. The putative respondent has no voice in the decision.

The last sentence of § 5(b) of the Act, to the contrary, permits reopening only on one of three stated grounds after "notice and opportunity for hearing" and appeals a clear direction, we believe, that Commission action thereunder is to bear the burden of showing one of those grounds on a full consideration of the complete record.

The Eighth Circuit has also adopted this view that the statute requires an adversary type hearing, *American Drug Corp. v F.T.C. supra.*

If such an obligation was not statutorily imposed on the Commission in a hearing to reopen an order under the last sentence of § 5(b) of the Act, what, we ask, would have been the Congressional intent in providing for Court of Appeals review? Certainly, if the respondent Commission has total discretion in these matters, or if its obligation is

purely procedural, then what would there be for the appellate court to consider?

Our issue, therefore, becomes one of the nature of the publication for review—that the only issue on appeal was the lic interest showing which the Commission is required to make under the last sentence of § 5(b) of the Act.

1. *"Public Interest" Must Be "Specific and Substantial"*

The basic definition of "public interest" is, as this Court has repeatedly pointed out, the decision by Mr. Justice Brandeis in *Federal Trade Commission* v. *Klesner*, 280 U.S. 19 (1929). The case concerned the phrase "interest of the public" as used in the first sentence of Section 5(b) as a basis for the issuance of an original complaint. Even with respect to that much broader use, it was held:

> "While the Federal Trade Commission exercises under Section 5 the functions of both prosecutor and judge, the scope of this authority is strictly limited. A complaint may be filed only if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.' This requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even if they have been deceived—the evidence commonly adduced by a plaintiff in 'passing off' cases in order to establish the alleged private wrong. . . . . To justify filing a complaint the public interest must be specific and substantial."

This language of Mr. Justice Brandeis has been repeated and reaffirmed down to the present by this Court. In *American Airlines* v. *North American Airlines*, 351 U.S. 79 (1956), this Court cited the *Klesner* decision to the effect that courts must review "whether or not the facts, on com-

plaint or as developed, show the public interest to be sufficiently 'specific and substantial' to authorize a proceeding by the Commission," and "whether, in determining what is the public interest, the Board has stayed within its jurisdiction *and applied criteria appropriate to that determination.*" [Emphasis added]

This principle from *Klesner* was further elaborated in *National Broadcasting Co.* v. *United States,* 319 U.S. 190, in discussing the nature of "public interest" on which the licensing power of the Federal Communications Commission rested. The Court pointed out this was

> "a criterion which 'is as concrete as the complicated factors of judgment in such a field of delegated authority permit' [and] . . . not to be interpreted as setting up a standard so indefinite as to confer an unlimited power . . . *The requirement is to be interpreted by its context* . . . ." [Emphasis added]

2. *The Higher Standard of "Public Interest" in the Context of Decree Modification*

The context of this statutory hearing was not the issuance of a complaint but the setting aside of an existing order. As noted above the distinction was clearly drawn in Footnote 7 of the first opinion of the Court of Appeals in *Elmo* v. *Federal Trade Commission,* where the Court said, "Congress, at least considers the finality of consent orders to be of more than trivial concern," and that accordingly there must be shown "some public interest consideration—which justifies setting aside the consent order." (App. p. 42a) The Court of Appeals did not there refer to the *ex parte* evidence of "interest of the public" which would have been sufficient for the issuance of an original complaint, but rather to such public interest consideration as would show "the necessity for disturbing such order."

This distinction is one which is made by all of the decided cases. Thus, while this Court has often held that the right of modification is an inherent administrative power, *Louisville & N. R. Co.* v. *Sloss-Sheffield Steel & I. Co.*, 269 U.S. 217, 46 S. Ct. 73; *United States* v. *Sherman & Sons Co.*, 237 U.S. 146, 35 S.Ct. 520, it has also many times pointed out that no such implied right of modification will exist where there has been final quasi-judicial agency action formalized in a judicially reviewable certificate, patent, or decree, whether or not containing modification language. Thus the Court held in *United States* v. *Seatrain Line*, 329 U.S. 424, *Civil Aeronautics Board* v. *Delta Airlines, Inc.*, 367 U.S. 316, and *American Trucking Association* v. *Frisco Transportation Co.*, 358 U.S. 133, that strong limitations existed against any agency action to reopen and modify previously final decrees on the grounds of public interest. Petitioner says the Court of Appeals erred in its view of these decisions since each directly concerns the administrative limitations on a *statutory* power of modification in the 'public interest' of a judicially reviewable final order of a quasi-judicial agency.

In each of these three cases we have the I.C.C. or C.A.B. seeking to reopen and change a certificate under their statutory modification powers whenever the "public interest, convenience and necessity" required. In *Seatrain* such modification was summarily denied. This Court pointed out that "Seatrain had expended large sums of money in reliance on the complete validity of the certificate," and any effort by I.C.C. to use its statutory modification authority because of a change of mind or policy was forbidden. The Court there held in what we will show to be an almost precise parallel to the present instance:

> "Thus it seems apparent that the Seatrain proceedings were reopened, not to correct a mere clerical error, but to execute the new policy announced in the Foss case."

Under the Aviation Act, the modification authority of the Civil Aeronautics Board is again based on a public interest criterion. In the *Delta Airlines* case, the C.A.B. sought to recall and modify an existing certificate of convenience and necessity, and this Court explained the issues that arise in such a case as the present.

> "Whenever a question concerning administrative or judicial, reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other. Since these policies are in tension, it is necessary to reach a compromise in each case and petitioners have argued at length that the Board's present procedure is a happy resolution of the conflicting interests. However, the fact is that the Board is entirely a creature of Congress, and the determinative question is not what the Board thinks it should do but what Congress has said it can do."

Your holding was that the intent of Congress in the Aviation Act was to secure finality with a heavy burden of proof on the Board of showing a compelling reason for upsetting an existing grant. The equitable estoppel point, which so clearly exists in the present case, was also before you in *Delta*.

> "Furthermore, it would seem that any realistic appraisal of the relative hardships involved in this case cuts in favor of the respondent. . . Were the Board correct, respondent would be subjected to the loss of valuable routes, routes it has already begun to operate after considerable initial investment, without being heard in opposition."

Moreover, this Court specifically overruled the argument made by the Government that Delta assumed the risk of any modification because the original certificate read that it could be modified "if the public convenience and necessity so require."

On the other hand, you did permit a modification of the certificate in the *American Trucking Association* case, but only because the order originally issued by the I.C.C. and the certificate which had been issued by the staff to the respondent were contradictory. A clear clerical error was involved. However, this Court warned:

> "Of course, the power to correct inadvertent ministerial errors may not be used as a guise for changing previous decisions because the wisdom of those decisions appears doubtful in the light of changing policies. Such was the case in *United States* v. *Seatrain Line, supra,* where it was apparent that the Commission had not reopened prior proceedings to correct a mistake in the issuance of a certificate, but to execute a subsequently adopted policy . . . To allow the reopening of proceedings in such a case under the pretext of correction would undercut the obvious purpose of . . . the Interstate Commerce Act . . . which makes the issuance of a certificate the final step in the administrative process."

3. *There Is a Public Interest in Administrative Finality*

On the same principles, the Commission has been held to be bound by its own prior orders. As stated by the Seventh Circuit in *United States* v. *Willard Tablet Co.*, 141 F. 2d 141 (1944) [152 ALR 194]:

> "The government's second contention seems to rest solely upon the provisions of the Federal Trade Commission Act, as amended, 15 USCA § 45(b)(g), that the Commission may, under certain conditions, modify

its order after expiration of time for appeal. Therefore, the contention is that such power of modification leaves an unappealed order without that finality essential to invoke the doctrine of res judicata. With this contention we do not agree.

"The Act provides that an order of the Commission shall become final at the expiration of sixty days if no appeal is taken (45(g)), and further provides for heavy penalties for violation of such order (45(1)). It further provides that 'the findings of the Commission as to the facts, if supported by evidence, shall be conclusive.' Subd. (c). Thus, even the reviewing court in the same proceedings is bound by the findings of the Commission. To allow their finality to be attacked in a collateral proceeding would seem to run counter to the provisions and purposes of the Act. As was said in the case of United States v. Piuma, D.C., 40 F. Supp. 119, 122:

> 'Is it the province of the court to try the truth or falsity of the defendant's advertisements already found to be false by the Commission? The answer to this question depends upon the meaning to be given the word 'final' as used in subsection (g). The purpose of the provision was to bring the doctrine of res judicata into the Federal Trade Commission's jurisprudence.'

In *United States* v. *1 Dozen Bottles etc.*, 146 F. 2d 361 (C.A. 4, 1944), it was noted that the findings of the Commission were *res judicata* not merely as to the Commission but as to the Government as a whole and would therefore prevent the institution of a condemnation action under the Federal Food, Drug and Cosmetic Act by the Department of Justice. *A fortiori*, such findings would prevent a relitigation in the same agency.

As stated in *George H. Lee Co.* v. *F.T.C.*, 113 F. 2d 583, 585-6 (C.A. 8, 1940):

> "Although the remedies sought by the government in the two proceedings were different—condemnation in the first, and a cease and desist order in the second,—it is obvious that the alleged falsity of the representation of the petitioner with respect to the therapeutic value and effectiveness of its product constituted the main basis for each of the proceedings, that in the libel proceeding the court determined that the representations that the product was a remedy for tapeworms and pinworms as well as large and roundworms were not false, while the Commission later determined that the representations with respect to pinworms and large tapeworms were false and misleading. It is equally obvious that the Commission completely disregarded the effect of the decree entered in the libel case in conducting its proceedings and in making its findings of fact, conclusions of law, and order.
>
> "Where the underlying issue in two suits is the same, the adjudication of the issue in the first suit is determinative of the same issue in the second suit. Sunshine Anthracite Coal Co. v. Adkins, 60 S.Ct. 907, 916, 84 L.Ed. 1263. 'There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between the party and another officer of the government.
>
> "The United States may not relitigate the same issue in successive libel proceedings involving different qualities of the same product (George H. Lee Co. v. United States, 9 Cir., 41 F. 2d 460), nor may it relitigate the same issue in any proceeding in which the parties are the same and the product is the same.

"Unless a question which a court or an administrative board has power to decide is to be regarded as conclusively settled as between the parties by the final decree of the court or the final order of the board, there can be no end to a controversy except as the result of the financial disability of one of the parties."

In addition to the public interest in administrative finality there is an equally important public interest in the negotiated settlement of disputes.

"The values served by negotiated settlement are obvious and great. Consent decrees save time and expense for the defendants and the Government, and are a blessed relief to our over-burdened courts. The savings to the Government multiply by many times what can be accomplished with any given amount of inevitably limited enforcement resources. Quick resolution of the issues raised by antitrust attack relieves defendants of the years of costly uncertainty that unresolved ligitation imposes on critical business decisions." "Antitrust Consent Decrees: Some Basic Policy Questions," by Donald F. Turner, *The Record,* ABCNY, Vol. 23, No. 2 (February 1968).

4. *The Mohr Case:*

The Court below placed its reliance upon the decision of the Ninth Circuit in *Mohr* v. *Federal Trade Commission,* 272 F.2d. 401 (1959). That case was concerned with a cease and desist order which had theretofore been issued by the respondent Commission against misrepresentations contained on skip-tracing forms. The original order required the deletion of certain language from these forms. It was found that this was inadequate to prevent deception of the public and a change was made after hearing to require certain

affirmative language. This is not the present case. As can be seen, the *Mohr* decision is a compliance case, concerning only the form of relief. In fact, the Ninth Circuit characterized the order involved as being so confused in language that the "clarification thereof would be in the public interest."

To the contrary, there is no issue of compliance in the present case. There is no confusion in the language of the 1952 order. What the respondent Commission seeks to change is not the language of the advertising, but the underlying findings on which it is based—without the showing of any change of fact requiring it. In this case, we are solely concerned with a change of view on the part of the Commission as to what the previously existing Commission should have considered to be the public interest in 1952.

We also note that when the respondent Commission brought the *Mohr* case back before the Ninth Circuit, Judge Barnes, in denying the relief requested, said:

> ..."If the Federal Trade Commission's order is insufficient, then that body should reopen proceedings and modify its order. But such modification procedure, or its advisability, is not now before us." ...
> *In Re Floersheim*, 316 F.2d. 423, 428 (9th Cir. 1963)

II

The Only Specific "Public Interest" Factor Asserted By The Commission was one this Court has held to be inadequate as a basis for reopening a final Decree.

Since no change of medical fact is asserted between 1952 and 1966, then every statement made in the Examiner's Finding 10, whether true or false, was equally available to the respondent in 1952 as a basis for its consideration in assessing the public interest in approving that order. The Commission recognized the logical force of this conclusion.

"COMMISSIONER ELMAN: Did you try to show that the state of medical knowledge in 1966 on this particular subject was different from the state of medical knowledge in 1952?

"MR. CHARLTON: No, we did not. No, sir. All the testimony in this record is portions of the transcript that were held in the original proceeding in Docket No. 8615, which—

"COMMISSIONER ELMAN: And you did not attempt to show that as to these particular preparations and devices there had been any change in the state of medical understanding or knowledge regarding their therapeutic value?

"MR. CHARLTON: No, sir." (JA 175)

To answer this, two approaches were argued on behalf of respondent to the examiner and to the Commission, (1) That if on the 1952 facts the order did not go far enough that is sufficient public interest to modify it; and (2) that if more were required, the public interest consideration before the Commission was the Commission's own 'mistake' in not having obtained information (or made a record of it) in 1952.

"HEARING EXAMINER SCHRUP: Now, apparently the Commission in asking—in reopening this, feels that the original order did not go far enough. That is the way I would see it as of now, isn't that right?

"MR. CHARLTON: That is correct." (JA 7)

. . .

"HEARING EXAMINER SCHRUP: Well, now, let me ask you this, Mr. Charlton: In what respect did the original order under the consent agreement not go far enough? What didn't it prevent that you believe it should have prevented?

"MR. CHARLTON: Well, from the present medical information that I have, the cease and desist order in 1952, which was a consent order, on which there is no testimony in the record, allowed them to make certain claims for this product. We feel now that—you medical people say that these claims should not be allowed, that the product will not do the things that it has been allowed to say under the old order.

"HEARING EXAMINER SCHRUP: Well, as I get your position, it is this, that in 1952 under the consent agreement and the order, the fact that certain representations were not prohibited and perhaps the state of the medical opinion at that time was or has been subject to change, that nonetheless, regardless of whether it has or has not changed, that as of today under the present state of medical opinion they should be prevented.

"MR. CHARLTON: That is correct. The public interest requires a stronger order preventing certain representations which were allowed under the old order.

"HEARING EXAMINER SCHRUP: So it would be, as far as your position is concerned, it would be immaterial as to what the state of the medical opinion was at the time of the old order.

"MR. CHARLTON: That is correct.

Throughout the hearings respondent's earlier finding of public interest in entering the 1952 order was referred to as "mistake":

"HEARING EXAMINER SCHRUP: Well, I gather from Mr. Charlton that the posture of the case is just not exactly that. He states that the Commission acted at that time and accepted this consent agreement with no medical reports in the files, so that we aren't—according to his position, there isn't any question of change or no change

because there was nothing existent upon which they acted. [*]

"Now, his position is that, of course, moots that particular point, he says, but what he says now in the public interest is that if the Commission made a mistake in accepting that agreement, that the order is now not adequate to prevent what he conceives to be the false representations existing today.

"Is that a correct summation of your position?

"MR. CHARLTON: Correct.

"HEARING EXAMINER SCHRUP: And your position then is that all you have to show now is that there are false representations existing which the old consent order did not reach, and therefore, the consent agreement should be abrogated and a trial should be had to determine whether the representations being made today are false and should be prohibited.

"MR. CHARLTON: That is correct." (JA 9, 10)

And this change of agency view as meeting the statutory requirement 'public interest' was repeated before the Commissioners:

"CHAIRMAN DIXON: Just a minute. Under the procedure then the facts they accepted were that the product was no good. Those were the 1952 facts. They just didn't write a good order. That is what you are saying.

"MR. CHARLTON: That is correct.

"COMMISSIONER ELMAN: But in 1952 the Commission made a determination that it was in the public interest to issue that order.

"MR. CHARLTON: That is correct.

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* Despite the stated lack of any agency file, petitioner queries the 1952 absence of medical consultation by the Commission, since the language of the 1952 order is coincidentally an almost precise summarization of the medical opinions given in petitioner's 1966 submission.

"COMMISSIONER ELMAN: And you are saying that that was a mistake.

"MR. CHARLTON: That is correct.

"COMMISSIONER ELMAN: And the same facts, and on the same law, nothing has changed, that this Commission in 1966 should make a different determination as to what kind of an order is in the public interest in remedying the facts that were found then which you say haven't changed.

"MR. CHARLTON: That is correct.

"COMMISSIONER ELMAN: Aren't you saying it is a mistake?

"MR. CHARLTON: The rule does not require that the Commission find a change of law or a change of fact solely as a basis for setting aside.

"COMMISSIONER ELMAN: You say there has to be public interest, but the only public interest you have shown is that there has been a mistake.

"MR. CHARLTON: Well, that is sufficient grounds to set it aside according to the statutes, to the case that I have cited, *P. Lorillard Company* v. *Federal Trade Commission*. The court has said—

"COMMISSIONER ELMAN: A mistake which consists solely of a different assessment of the public interest." (JA 176-7)

As this Court has held a change of mind or afterthought by any agency is not "mistake" as the law accepts that term, e.g., the *Seatrain* and *American Trucking* decisions, *supra*, p. nor is the asserted failure of a prior Commission to get information in 1952 a showing of 'public interest' as to reopen an existing decree.*

* And if there is no file on the considerations underlying the 1952 order, we point out that the lack of evidence is not only as to the medical opinions received but as to the mutual concessions which the parties may have made

III

The Failure Of the Commission To Make Such a Showing Deprives Petitioner Of Substantial Rights.

As the Eighth Circuit said in remanding a reopening order to the Commission in the *American Drug case supra;*

> . . .'' Obviously, changed conditions of fact or law may be contestable issues. No less true is the issue of whether such action is required by 'the public interest'. *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 23, 27, 30; 50 S.Ct. 1, 2; 74 L.Ed. 138; 69 A.L.R. 838.''

And if by law this public interest issue is 'contestable', the distinction is one of considerable substantial right to petitioner. Where a truly adversary proceeding is required, not only must the ultimate findings of an agency rationally flow from basic findings supported by evidence, *Bond* v. *Vance*, 117 App. D.C. 203, 327 F. 2d 901 (1964), but the ''whole record'' must include the evidence contrary to the agency decision. Cf. *Shaw* v. *Celebrezze*, 245 F. Sup. 572 (D. Ga. 1965); *Interstate Motor Freight System* v. *U.S.*, 243 F. Sup. 868 (D. Mich. 1965). Or, as this Court has put it, ''substantial evidence'' must be such as would have justified denial of a directed verdict on a jury fact, i.e., consideration of the submission by both sides, *Consolo* v. *Fed. Mar. Comm.*, 383 U.S. 607, 86 S.Ct. 1018.

Where there is substantial evidence relating to material facts on which there are no findings and from which different conclusions may be drawn, the determination of whether such substantial evidence exists must include any necessary evaluation of the evidence of *both* parties, the relative value of testimony and witness qualification, *Foote Bros. Gear &*

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in the negotiation of the consent decree and which presumably were the *quid pro quo* for its acceptance.

Machine Corp. v. *N.L.R.B.*, 114 F. 2d 611 (7 Cir. 1940), and see *Fed Trade Comm.* v. *Curtis Pub. Co.* 260 U.S. 568.

In its consideration the agency may not disregard the testimony of an unimpeached witness, *American Smelting & Refining Co.* v. *N.L.R.B.*, 126 F. 2d 680 (8 Cir. 1942), nor ignore the fact testimony of an expert witness, *Boggs & Buhl, Inc.* v. *C.I.R.*, 34 F. 2d 859 (3 Cir. 1929). In fact, any disregard by an agency of convincing rebuttal evidence makes findings not conclusive, *N.L.R.B.* v. *Thompson Products, Inc.*, 97 F. 2d 13 (6 Cir. 1938).

Clearly, an *ex parte* determination on Commission evidence deprives petitioner of these substantive rights under the Act.

Conclusion

Petitioner submits that it has demonstrated (a) that Congress by the Wheeler-Lea Amendment to the Federal Trade Commission Act—in the absence of any change of fact or law—required the respondent Commission to bear the burden of proving on an adversary and contested basis that a specific and substantial public interest existed which required the reopening of an existing cease and desist order, and (b) that the respondent Commission has failed to make such proof in the instant case.

Petitioner further submits that the issue involved is of national importance and first impression, involving the general principles of administrative law in the finality of quasi-judicial decisions and encouragement of consent decrees, and more specifically, the authority of the respondent Commission under the last sentence of § 5(b) of the Federal Trade Commission Act.

Petitioner prays an order of this Court granting a writ of certiorari directed to the United States Court of Appeals

for the District of Columbia Circuit to review and set aside in this Court the prior determination herein.

Respectfully submitted,

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Dated April 22, 1968.